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Supreme Court of the United States

October Term, 1952

No. 783

In the Matter of

NEW STRAND THEATRE, INC.,

Bankrupt,

MORRIS RATETT,

Petitioner,

LEO KAPLAN, Trustee in Bankruptcy of New Strand Theatre, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Morris Ratett prays that a writ of certiorari issue to review the order and decree of the United States Court of Appeals for the Second Circuit entered in the above cause on the 4th day of February, 1953, affirming an order of the District Court of the United States for the Southern District of New York dated January 5, 1953 (R. 29). The order of the District Court dismissed the petition to review the order of a Referee in Bankruptcy (R. 26, 27).

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirmed the order of the District Court (R. 28). The opinion of the District Court (R. 2-8 incl.) is reported in 109 Fed. Supp. 350. The Referee rejected the offer of Morris Ratett to purchase the assets of the New Strand Theatre, Inc., and ordered that a new sale be held in accordance with his decision made at conference held before him on December 12, 1952, to discuss the sale (R. 26).

Jurisdiction

The judgment of the United States Court of Appeals was entered on February 4, 1953.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. 347).

Questions Presented

Petitioner was the highest and successful bidder at the sale conducted by the attorney for the trustee in bankruptcy in the presence of the Referee in Bankruptcy upon an order to show cause theretofore entered and predicated upon a prior bid subject to existing liens, which was fixed as the upset price. The bid of petitioner was slightly less than seventy-five percent of the appraised value of the property. There was open and competitive bidding at the sale and the trustee recommended that the offer be approved. The Referee thereupon requested the trustee's attorneys to submit an order. Three days later one of the unsuccessful bidders at the sale notified the trustee's attorneys that he desired to increase his bid and six days later another prospective purchaser made a still higher offer. Subsequently

a further conference was held and although there was no charge of legal or equitable fraud, unfairness or mistake in the conduct of the sale, or gross inadequacy of price, the Referee refused to sign the order confirming the sale of the property to petitioner and ordered a new sale for no other reason than that the bid of petitioner did not reach seventy-five percent of the appraised value and new offers had been brought to the attention of the Court.

The District Court dismissed the petition to review the order of the Referee. The United States Court of Appeals for the Second Circuit affirmed the order of the District Court.

The questions presented are:

1. Was there a judicial approval of the sale to petitioner, as prescribed in Section 70(f) of the Bankruptcy Act (11 USCA, Section 110[b]), without the signing of a formal court order?

2. Was the Referee required to sign the order approving the sale to petitioner submitted to him by the attorneys for the trustee after the trustee had recommended such approval and the Referee had requested the attorneys for the trustee to submit an order, in the absence of legal or equitable fraud, unfairness, mistake, or gross inadequacy of price?

3. Was it against public policy for the Referee to reject the offer of petitioner solely by reason of the fact that subsequent new and higher offers had been brought to the attention of the Court before the actual signing of the confirmation order?

4. Did the decisions of the Courts below violate the well established general principle of law enunciated by the Courts that a new offer to pay more than the price bid is not a substantial ground for setting aside a sale?

Statement

A bid in the sum of $10,000.00, subject to existing mortgages, was made to the trustee in bankruptcy of New Strand Theatre, Inc., for the sale of the assets of said bankrupt, consisting of real property and its contents, subject to liens amounting to $11,750.00. Based upon said offer an order to show cause was granted fixing the date of sale, providing for the appointment of appraisers, publication, and the giving of notice. The appraisers appointed by the Referee appraised the property at $41,725.00. The sale was advertised and was well attended. The bidding started above the upset price of $10,000.00. Some twenty-eight bids, each higher than the offer, were made until petitioner offered $18,700.00. This other of $18,700.00, plus the liens of $11,750.00, totalled $30,450.00, which was the highest bid. This bid, however, was $843.00 less than $31,293.75, which would be seventy-five percent of the appraised value of $41,725.00. (R. 9-12 incl.).

After the bidding was concluded counsel to the trustee, who was conducting the sale before the Referee, stated as follows:

> "Mr. Weintraub: $18,700 once, $18,700 twice, $18,700 three times. Sold to Mr. Ratett. What is your full name and address?"

He then stated that the bid is slightly below seventy-five percent of the appraised valuation but that he had discussed the matter with the trustee and that they felt that in view of the spirited bidding and that it had been amply advertised that the Referee should confirm the sale and the Referee thereon stated "Submit the order." The minutes of said hearing contain the further statement "Assets sold to Morris Ratett, Mt. Kisco, New York, for $18,700." (R. 12).

The trustee, on the day of the sale, duly deposited in his account the $5,000.00 certified check of petitioner (Ratett's Ex. 3) (R. 22) which accompanied his bid. On the same day the attorneys for the trustee notified petitioner's attorney that petitioner paid $5,000.00 on account of the purchase price, that the closing was scheduled for December 12, 1951, and that they would endeavor to have a closing statement available before that time (Ratett's Ex. 5) (R. 23). On December 5, 1952, the attorneys for the trustee also advised the title company that they expected to close on December 12, 1952, and that the property had been purchased by Morris Ratett (Ratett's Ex. 6) (R. 23).

Three days later, and on December 8, 1952, one of the unsuccessful bidders at the sale notified the trustee's attorneys that he desired to increase his bid to $20,000.00 (R. 13). On the said day the attorneys for the trustee addressed a communication to the Referee enclosing the proposed order of confirmation and advising him of the increased offer (Ratett's Ex. 8) (R. 23). Thereafter, and on December 11, 1952, another prospective purchaser offered $25,000.00 (Trustee's Exhibit 2 and 2A) (R. 13).

On December 12, 1952, an informal conference was held at the office of the Referee at the conclusion of which the Referee held that in the light of the substantially increased offer and also in view of the fact that the highest bid reached at the last special meeting that was called did not reach 75 percent of the appraised value, and particularly in view of the fact that the new offers had been brought to the attention of the Court before the confirmation order was signed, he felt it to be in the best interests of the creditors that the offer of petitioner be rejected and a new sale be held (R. 26).

The petition to review the order of the Referee was dismissed by the District Court and the Court of Appeals for the Second Circuit affirmed said order.

Statute Involved

Section 70(f) of the Bankruptcy Act (11 USCA, Section 110[b]) reads as follows:

> "f. The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever any sale of real or personal property of any bankrupt is made by or through any auctioneer employed by the court, receiver, or trustee, such auctioneer, if an individual or a partnership, shall be a bona-fide resident and citizen of the judicial district in which the property to be sold is situated, or, if a corporation, shall be lawfully domesticated and authorized to transact such business in the State in which said judicial district is located."

Specifications of Error to Be Urged

The Courts below erred

1) In failing to find that there was a judicial approval of the sale to petitioner, as prescribed by Section 70(f) of the Bankruptcy Act (11 USCA, Section 110[b]) at the time that the attorneys for the trustee recommended the approval even though the offer was slightly less than seventy-five percent of the appraised value and the Referee, having heard no objection from anyone, stated "Submit the order";

2) In failing to find that the Referee was required to sign the order approving the sale to petitioner, submitted to him on December 8, 1952, by the attorneys for the trustee, in the absence of the submission to the Court of a substantial ground for setting aside the said sale;

3) In rejecting petitioner's bid and ordering a new sale based only upon increased offers, one of which was made by an unsuccessful bidder at the original sale;

4) In holding that the rejection by Referee of the original bid prior to the formal signing of the order was discretionary with the Referee;

5) In failing to find that the Referee did not have the power to nullify the sale to petitioner in the absence of fraud, unfairness or mistake in the conduct of the sale or such gross inadequacy of price as to shock the conscience of the Court which would raise a presumption of fraud;

6) In failing to follow the well established principle of law enunciated by the Courts that an offer to pay more than the price bid is never substantial ground for the setting aside of a sale.

Reasons for Granting Writ

I.

The decisions of the Courts below with respect to what constitutes a judicial approval of the sale are in substantial conflict with the decisions of Courts of other circuits and of the United States Supreme Court.

The judicial approval under Section 70(f) of the Bankruptcy Act (11 USCA, Section 110[b]) is not to be found only in a formal court order. The statute does not specify any particular formal approval.

The undisputed facts in the case at bar disclose that there was an actual approval of the sale and that the signing

of an order was a ministerial act and required no exercise of discretion after the attorneys for the trustee had recommended the approval and the Referee had stated "Submit the Order" and the minutes of the hearing show that the property was sold to petitioner. The Referee's statement "Submit the order," made at the conclusion of the sale and following the trustee's recommendation of the acceptance and approval of the bid was clear and unequivocal. Otherwise there would be no purpose in submitting an order to the Court approving the sale. That statement cannot be considered and must not be considered in the light of subsequent events.

In *Re Shea,* 126 Fed. 153, the Court of Appeals for the First Circuit ruled that a sale of a bankrupt's assets for less than seventy-five percent of the appraised value, and we quote the headnote (headnote 5), "conveys no title till confirmed, expressly or *impliedly*" (emphasis supplied). In that case Judge Putnam, who wrote the unanimous opinion of the Court, at page 156, stated as follows:

> "We do not undertake to say that section 70b requires always a formal approval. If a sale is made and silently acquiesced in for a considerable time, or if the proceeds thereof are credited in the trustee's account, and the account is passed, either may be held to meet the requirements of the statute."

In *Files* v. *Brown* (C. C. A. 8), 124 Fed. 133, a parallel situation was presented to that found here. That involved a sale of property of an insolvent bank by a receiver under the National Banking Act. It was contended that the sale "never became final, because there was no order of confirmation of it" (p. 137). There the Court unanimously held, per Sanborn, *J.*, at pages 137 and 138, as follows:

> "The reason of the old rule in chancery that sales made by a master under an order or decree of court

are not final unless confirmed is that the court is the vendor, and it cannot know what the offers or bids will be at a sale at auction; that the master is its agent to receive and report the bids, without authority to accept any of them. Hence it is not until the best bid has been reported to the court, and it has accepted it, and confirmed the sale by an order directing the master to complete it, that it becomes final. *The reason of this rule ceases to be in a case like that at bar, where the bid is reported to the court in the first instance, and it accepts it and orders the master or receiver to take the price offered and to convey the property to the purchaser. And where the reason of a rule no longer exists, the rule itself ceases to be.*" (Emphasis supplied.)

In the leading case of *Camden* v. *Mayhew,* 129 U. S. 73, it was contended that Camden's bid was "in legal effect only an offer" and "that an acceptance of that offer could only have been manifested by an order confirming the sale," and that since "no such order was in fact made" Camden could not have been held liable. The Supreme Court, at page 83, ruled:

"It may be that if the court below had determined to hold Camden to his bid for the property, a necessary preliminary step to that end would have been the formal confirmation of the sale, and, perhaps, the tender of a deed, to be followed by an order compelling him to pay the whole amount that he offered. *But it was not restricted to that particular mode of securing the rights of the parties for whose benefit the property was sold; for, upon appellant refusing to pay the amount bid, the court without confirming the sale by a formal order, could have held him to his offer,* and ordered a resale in the meantime at his

> risk, both in respect to the expenses of the resale and any deficiency resulting therefrom." (Emphasis supplied.)

In *In re Rival Knitting Co.* (C. C. A. 2), 289 Fed. 960, the Court cited *Camden* v. *Mayhew, supra,* with approval and, at page 963, unanimously said:

> "This was a judicial sale, and if Epstein was bidder, in a proceeding properly instituted, where personal service was made upon him, after he refused to carry out the terms of his bid, the court without affirming the sale by *a formal order,* could hold him to his offer and could order a resale in the meantime at his risk, both in respect to the expenses of the resale and any deficits resulting therefrom." (Emphasis supplied.)

The foregoing authorities make it clear that a formal order of confirmation is not the only means through which judicial action may be evidenced in order to secure the rights of the parties at a public bankruptcy sale. It has been said (*United States* v. *Ward* [C. C. A. 8], 257 Fed. 372) that "a judicial act is an act of a court or magistrate in deciding a question of right litigated before him or referred by law to his judgment" (p. 378). And said Judge Thomas, in *O'Brien* v. *New York Edison Co.,* 26 Fed. Supp. 290, 291:

> "• • • the pronouncement of a judgment is a purely judicial act; its entry is ministerial."

The ministerial act of entering an order based upon the sale to petitioner did not involve any judicial discretion. The judicial approval under Section 70(f) of the Bankruptcy Act took place on December 5, 1952, when the sale was held and the Referee stated "Submit the order."

II.

The case involves questions affecting the public confidence in judicial sales and the extent to which the public may rely upon the finality of bidding at such judicial sales.

The sale of assets of a bankrupt estate for slightly less than seventy-five percent of the appraised value, once approved by the Court, is subject to the same principles of law as any other judicial sale made upon due notice and in accordance with law.

The sale in the case at bar was well advertised and the bidding was spirited and competitive. Petitioner's bid was the highest and made in good faith. On the other hand, the bid in the sum of $20,000.00, made three days after the sale was held by an unsuccessful bidder at the original sale, is questioned as to good faith.

The District Court, in its opinion, stated that petitioner, unfamiliar with law and the nature of judicial sales, understandably assumed, when the property had been knocked down to him and steps taken to close the title, that he was the successful bidder.

The Courts are concerned with laymen at judicial sales because they are the bidders. It is important that if they, as reasonable men, have concluded from the statements of the officers of the court and the steps taken to close the title, that they were the successful bidders, then the Court should take such steps as are necessary to protect the confidence of these people in judicial sales.

The Courts in the various circuits have disapproved of the practice of permitting bids after ascertaining the limits of competitors' bids. In *Smith* v. *Save-Rite Drug Stores*, (C. C. A. 10), 178 Fed. (2d) 507, the Court, at page 510, stated as follows:

> "It would sap the confidence in judicial sales and give an unfair advantage to those who choose to conduct their negotiations only after they ascertain the limits of their competitors' bids, rather than to pit their bargaining power against that of those who accept the invitation of the court to attend and bid at public sales."

The pertinent authorities are collated and quoted in *In re Stanley Engineering Corporation* (C. C. A. 3), 164 Fed. (2d) 316, wherein the Court, at pages 318 and 319, stated as follows:

> "These decisions establish:
>
> "[1-4] That judicial sales, made upon due notice and in accordance with law, will be confirmed unless (a) there was fraud, unfairness or mistake in the conduct of the sale; or (b) the price brought at the sale was so grossly inadequate as to shock the conscience of the court and raise a presumption of fraud, unfairness or mistake. Mere inadequacy of price is not a sufficient ground for setting aside a judicial sale where there was no unfairness in the conduct of the sale. In determining whether gross inadequacy exists the bankruptcy court must take into consideration appraisement of the property as a guide in the exercise of its discretion in accordance with the intendment of the statute cited. *Where the bankruptcy court fails to confirm a judicial sale in the absence of unfairness, fraud or mistake or gross inadequacy of price, its action will be reversed on the ground of abuse of its legal discretion.*" (Italics by the Court.)

The Court said that it "subscribed to the principles enumerated in *Jacobsohn* v. *Larkey*, 3 Cir., 1917, 245 F. 538,

page 541, L. R. A. 1918C, 1176" and, in doing so, stated, at page 319, as follows:

> " 'Judicial sales are an indispensable part of the machinery employed in administering bankrupt estates. *Public policy requires stability in such sales.* The Ruby, D. C., 38 F. 622; In re Burr [Mfg. & Supply Co., 2 Cir.] 217 F. 16, 19, 133 C. C. A. 126. *To induce bidding at such sales and reliance upon them, the purpose of the law is that they shall be final.* Pewabic Mining Co. v. Mason, 145 U. S. 349, 356, 12 S. Ct. 887, 36 L. Ed. 732; *they are not to be disturbed except for substantial reasons.*
>
> " '*After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale,* recognizing nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. Morrisse v. Inglis, 46 N. J. Eq. 306, 19 A. 16; In re Metallic Specialty Mfg. Co., D. C., 193 F. 300; In re Shapiro, D. C., 154 F. 673.' " (Italics by the Court.)

In the case at bar there was no finding of fraud, unfairness or mistake in the conduct of the sale nor was the price brought at the sale so grossly inadequate as to shock the conscience of the Court and raise a presumption of fraud, unfairness or mistake. On the other hand a new sale was ordered only because the trustee received an offer to pay more than the price bid at the original sale.

In *In re Stanley Engineering Corporation,* the Court, at page 319, further states as follows:

> "The rationale of the policy requiring confirmation of judicial sales in the absence of gross inade-

quacy, unfairness, fraud, etc., is succinctly stated in Knight v. Wertheim & Co., 2 Cir., 1946, 158 F. 2d 838. Said the Court in discussing judicial sales in bankruptcy proceedings, pages 843, 844 of 158 F. 2d: *'We recognize that except upon the extremest provocation, courts will not upset a judicial sale at auction, upon the ground that a new bidder has appeared who offers more than the knock-down price.* (Citing cases.) This unwillingness results from the effect upon such sales of knowing that a prospective bidder may abstain from bidding at the auction, may bide his time, and may then outbid the price at which the property has been struck down. That possibility tends to chill bidding at the sale, to dispose of the property by later competition on successive bids, and thus to defeat the very purpose of an auction, which is to fetch together all those who may be interested to buy and to set them against each other with whatever simulus that may provide, as opposed to other kinds of sale.' " (Italics by the Court.)

To the same effect see:

Prentice v. *Boteler et al.* (C. C. A. 9), 141 Fed. (2d) 175.

It appears conclusively from an analysis of the cases that the fact that a new offer was made by a third party who bid more than petitioner would not be a ground for setting aside the approval of the sale although a formal order had not been entered because such act is not conducive to respect of the public for judicial processes and tends to shake the public confidence in the validity and finality of judicial sales.

In *Sturgiss* v. *Corbin* (C. C. A. 4), 141 Fed. 1, the Court, at page 3, stated as follows:

"* * * The practice of opening biddings and of setting aside sales made during the progress of judi-

cial proceedings should not be encouraged, as it is not conducive to the interests of litigants, and it tends to shake public confidence in the validity and finality of judicial sales, and to unduly prolong litigation. A purchaser at a judicial sale, who has complied with the terms thereof, or who shows his willingness and ability so to do, is not only entitled to the protection of the court, but as a party to the proceeding, made such by his purchase, is so situated as to be entitled to the court's decree of confirmation, in the absence of the inadequacy, fraud, or mistake before alluded to."

The decision in the instant case appears to be in conflict with the decisions of the courts of other circuits and with decisions of this Court.

Conclusion

Wherefore it is respectfully submitted that this petition for writ of certiorari should be granted to review the order of the Court below.

Respectfully submitted,

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Opinions Below

The referee in bankruptcy refused to confirm a trustee's sale of a motion picture theatre to one, Morris Ratett (R. 26), and ordered a resale on competitive bidding based on a higher offer. On review Judge Edward A. Weinfeld in a comprehensive opinion affirmed and extended the time of sale (R. 2-8 incl.). The Court of Appeals affirmed on the opinion of the District Court (R. 28).

Statement of the Facts

The facts are not disputed. On December 5, 1952, the trustee in bankruptcy conducted a sale of a motion picture theatre before Referee Arthur J. Doran. Ratett was the highest bidder at $18,700, subject to various liens. This bid was less than 75% of the court appraisal which was $41,725. The assessed valuation of the realty exclusive of the personal property, was the sum of $46,000. During the course of the bidding the referee stated that the sale was subject to confirmation.

The trustee recommended acceptance in view of the fact that the bidding had been spirited and he knew of no other bids which had been made (R. 12). The referee thereupon stated that an order should be submitted without commenting on the trustee's recommendation. The statement appearing in the minutes, "Assets sold to Morris Ratett, Mt. Kisco, New York, for $18,700" (R. 12), was not the referee's statement. In the original record a space of four lines appears between the last statement of the referee and the aforementioned comment. The District Court did not find it to be part of the referee's comment and any other inference is erroneous.

Prior to the submission of the order of confirmation and on December 8, 1952, the trustee received an offer of $20,000 over and above all liens, accompanied by a certified check in the sum of $5,000 from one, Samuel Rogowsky, one of the bidders at the sale. The trustee's attorneys, in submitting the proposed order of confirmation of the Ratett offer, advised the referee of the new offer of Rogowsky. Thereafter,

and on December 11, 1952, the trustee received a bid of $25,000 over and above all liens from one, Florence Rosenbloom, who had not been present at the sale, accompanied by a cashier's check in the sum of $5,000.

The referee thereafter held a hearing on notice to the interested parties to consider the rejection or confirmation of the Ratett offer. His findings of fact and conclusions are as follows:

"(1) That the rejected bid was below 75% of the appraised value of the property; and

(2) The higher of the increased bids exceeded by $6300.00, or almost 35%, petitioner's rejected cash offer." (R. 7).

After affirmance by the District Court and the Court of Appeals, the assets were sold on February 6, 1953 at a newly conducted sale, in accordance with the order of the District Court, to the highest bidder for $25,000 above the liens. Petitioner, therefore, is in effect claiming that he is entitled to the difference between his bid of $18,500 and this sum of $25,000, or the sum of $6,500.

The referee's findings have not been shown to be clearly erroneous within the meaning of General Order 41 and, accordingly, were accepted by the District Court (R. 7).

Jurisdiction

Petitioner claims jurisdiction under 28 U. S. C. 1254, formerly in part, 28 U. S. C. 347, but no conflict

of circuits or interpretation of the Bankruptcy Act exists.

Question Presented

There is only one question presented for consideration: Did the referee in fact approve the sale to Ratett and, therefore, was there an abuse of his discretion in refusing to confirm the bid and in ordering a new sale (R. 4, 5). This is the sum and substance of petitioner's presentation of questions (Petitioner's Brief 2, 3).

Statute Involved

The applicable part of Section 70 (f) of the Bankruptcy Act (11 U. S. C. 110 (b)):

> ". . . Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. . . ."

Although the statute was involved in the analysis of the problem, no question involving its construction was raised.

Specifications of Error Urged

The six specifications urged reiterate petitioner's questions (Petitioner's Brief, 2, 3).

No Reason Exists for Granting Writ

I.

The referee did not approve the sale to Ratett nor abuse his discretion in refusing to confirm the Ratett bid.

Although Section 70(f) "does not specify any particular form of approval" (R. 5) of a judicial sale, yet there never has been any question but that the flexibility of the section is necessary for the application of judicial discretion. The conclusion of what constitutes approval is a question to be determined by the facts of each case. The facts were determined adversely to petitioner. The District Court held (R. 5):

> "To spell out approval, petitioner must rely upon the actions of the trustee and Referee in connection with the events of the sale and those subsequent thereto. It is stating the obvious that the recommendations of the trustee and his attorney and their actions at the sale and subsequent thereto are not binding upon the Referee. An accepted bid by a trustee makes the bidder no more than the one whose proposal has been recommended. Sales under §70 of the Bankruptcy Act are not complete until confirmed, and no action or conduct by the trustee can serve to establish such approval which involves the exercise of the court's discretion.
>
> Thus, I come to the remaining ground which petitioner advances to support his claim of an— in fact approval, the Referee's statement, 'Submit

> order', made at the conclusion of the sale and following the trustee's recommendation of acceptance of the bid. Any inference of approval, sought to be drawn from the direction for the submission of a proposed order, is negatived by the fact that the Referee signed no order of approval, made no statement of approval and stated during the course of the spirited bidding: 'This is subject to confirmation.' Finally, §70(f) of the Bankruptcy Act, which gives the court power to confirm or set aside a sale of the bankrupt's property, requires the exercise of judicial discretion, and this may not be inferred. Judicial discretion is positive action taken in clear and unmistakeable terms."

In holding that there was no abuse of discretion, the District Court cited the Referee's findings with approval (R. 7):

> "Under General Order 47 of the Supreme Court, the Referee's findings of fact are to be accepted by the district court unless clearly erroneous. under these circumstances, it cannot be held that the failure to accept petitioner's bid, even though it was the highest one at the original sale, was an abuse of discretion."

II.

The decision of the courts below are not in conflict with the decisions of courts of other circuits or this court as to what constitutes a judicial approval of a bankruptcy sale.

1. The District Court cited *In re Klein's Rapid Shoe Repair Co.,* 2 Cir., 54 F. 2d 495, for two propositions (R. 5):

> "(1) An accepted bid by a trustee makes the bidder no more than the one whose proposal has been recommended. (2) Sales under §70 of the Bankruptcy Act are not complete until confirmed . . ." (R. 5).

(a) The *Klein* case, *supra,* cited with approval *In re Burr Mfg. & Supply Co.,* 2 Cir., 217 F. 16, *In re Wolke Lead Batteries Co.,* 6 Cir., 294 F. 509, *Bryant* v. *Stockhausen Co. Inc. et al.,* 4 Cir., 271 F. 921, and the *East Hampton,* 2 Cir., 48 F. 2d 542, holding at p. 496 (R. 6):

> ". . . Section 70 of the Bankruptcy Act (11 U. S. C. A. §110) gives to the District Court the power to confirm or set aside, in its discretion, a sale of the bankrupt's property . . ."

2. The *Wolke* case (6 Cir.), *supra,* was cited by the court for the holding that "petitioner as the highest bidder (has) no enforceable interest which compels automatic confirmation of the sale. The matter is still one of the court's discretion" (R. 6).

3. *Jacobsohn* v. *Larkey,* 3 Cir., 345 F. 538, *Bovay* v. *Townsend,* 8 Cir., 78 F. 2d 343, and *Pewabic Mining*

Co. v. *Mason,* 145 U. S. 349, were all cited for the holding that the public at large be given notice of the resale (R. 7).

4. The case relied upon most by petitioner in the lower court and in this court, is *In re Stanley Engineering Corporation,* 3 Cir., 164 F. 2d 316. The District Court distinguished it from the case at bar (R. 6):

> "*In re Stanley Engineering Corporation,* 3 Cir., 164 F. 2d 316, cert. denied 332 U. S. 847, decided subsequent to *Klein's Rapid Shoe Repair Co., supra,* and so heavily relied upon by petitioner in support of his position, is readily distinguishable. There, the bid not only exceeded 75% of the appraised value, but was substantially in excess of the appraised value. Thus, it cannot be held as authority to require, in effect, automatic approval of the highest bid submitted at a fairly-conducted sale where the bid is below 75% of appraisal. To so hold would result in judicial repeal of §70f of the Bankruptcy Act, which, as noted, involved the exercise of discretion by the court where the bid is less than the stipulated percentage."

(a) But the court did more than merely distinguish the case; it cited it with approval (R. 7 note 4). Furthermore, the *Stanley* case, *supra,* as cited in petitioner's brief (pp. 12, 13 and 14) cited with approval two cases of the Court of Appeals, *Jacobsohn* and *Burr, supra,* and the Supreme Court case of *Pewabic Mining Co., supra.* All were cited with approval by the lower court.

(b) Having adopted the logic and reasoning of the cases cited by petitioner in his Point II, and having

approved the principal cases cited by petitioner, it is difficult to see how the court erred.

5. The remaining three cases cited by petitioner in his Point II do not support his position.

(a) *Prentice* v. *Boteler, et al.,* 9 Cir., 41 F. 2d 175, sustains respondent's contention (p. 176):

> "It is well established that where a district court upholds the confirmation by a referee in bankruptcy of sale made by a trustee in bankruptcy, this court will not interfere in the absence of a clear showing of abuse of discretion. *Coulter* v. *Blieden,* 8 Cir., 104 F. 2d 29; *Kimmel* v. *Crocker,* 10 Cir., 72 F. 2d 599, 600; *In re Hagerstown Silk Co.,* 4 Cir., 69 F. 2d 790, 792; *Currin* v. *Nourse,* 8 Cir., 66 F. 2d 137, 140; *In re Wolke Lead Batteries Co.,* 6 Cir., 294 F. 509, 511; *Jacobsohn* v. *Larkey,* 3 Cir., 245 F. 538, 542, L. R. A. 1918C, 1176."

(b) *Sturgiss* v. *Corbin,* 4 Cir., 141 F. 1. The additional bid was only 4% higher than original bid. It is noteworthy the court had already set aside one sale. No discussion of Section 70(f) was involved.

(c) In *Smith* v. *Save-Rite Drug Stores,* 10 Cir., 178 F. 2d 507 (Petitioner's Brief 9 and 10), the additional bid was again only 5% in excess of the original bid. The court cited with approval, *Reid* v. *King,* 4 Cir., 157 F. 2d 868 (p. 509):

> "The Reid bid was substantially inadequate and below the fair market value of the property and that, under the circumstances, the court was justified in accepting the Roberts bid and confirming the sale to him."

It is obvious that a different result would have occurred in the *Smith* case if the facts were those at bar. At page 510 the court stated:

> "We are of the opinion that if the court, on a proper showing, had found that the Smith bid was inadequate and substantially below the fair market value of the property, it might have rejected all of the bids and ordered a new sale, but that the court did not do. It undertook to keep the confirmation of the Smith bid open until it could ascertain if a higher bid could be obtained."

The court also cited the *Stanley* case, *supra,* with approval and for the same principle cited below (p. 510):

> "That it was an abuse of discretion for a bankruptcy court to fail to confirm a sale which was properly conducted, which produced a bid in excess of the appraised value of the property, in the absence of unfairness, fraud, or mistake, or gross inadequacy of price . . ."

III.

Four cases cited in petitioner's Point I do not conflict with the holding of the lower courts that the referee did in fact not approve the sale.

As was shown in I *supra,* there was never any informal approval of the sale. The District Court made this quite clear in its opinion (R. 5). Nevertheless, petitioner endeavors to show by four cases that an informal approval can be given. The facts

of the cases do not show any parallel or similarity nor are they in conflict with the case at bar.

1. *In re Shea,* 1 Cir., 126 F. 153, cited on page 8 of petitioner's brief, supports respondent's contention. Although no one can seriously contend that headnotes constitute the holding of the court, nevertheless, petitioner cites them for the purpose of showing that a sale can be implied from conduct. The facts, however, and the citation on page 8 of petitioner's brief show no parallel with the case at bar.

2. *Files* v. *Brown,* 8 Cir., 124 F. 133 (p. 8 of Petitioner's Brief), was not a bankruptcy case, but nevertheless, even there the question was whether the bid had been accepted by the court.

3. *Camden* v. *Mayhew,* 129 U. S. 73 (p. 9 of Petitioner's Brief), dealt with the rights of parties where a bidder desired to withdraw his offer and the case held that the court could, without confirming the sale by a formal order, have held him and ordered a resale.

4. *In re Rival Knitting Co.,* 2 Cir., 289 F. 960 (p. 10 of Petitioner's Brief), cited the *Camden* case, *supra,* with approval, and it likewise dealt with the situation involving a purchaser, refusing to perform his bid. Its irrelevance is seen from the citation at page 963:

> "Where a purchaser refuses, without cause, to make his bid good, he may be compelled to do so by rule or attachment issuing out of the court under whose decree the sale is had. *Camden* v. *Mayhew,* 129 U. S. 85, 9 Sup. Ct. 249, 32 L. Ed. 608."

IV.

Cases in all circuit courts are in harmony with the principle enunciated in this case, that confirmation of a sale under Section 70(f) is a matter of approval in the sound discretion of the court.

The principle was clearly enunciated by the court in *Reid* v. *King,* 4 Cir., 157 F. 2d 868, where the court stated in summarizing the rule for judicial sales (p. 870):

> "The matter is well summed up in the following passage from 4 Collier on Bankruptcy, 14th Ed., Sec. 70.98 at pp. 1584-1586 as follows:
>
> " 'Generally speaking, however, confirmation may be denied on the basis of inadequacy of price where there is a substantial disparity between the bid or contemplated sales price and the appraised or fair market value, and (1) where there is a reliable degree of probability that a substantially better price will be secured by a resale or (2) some element, however slight, of unfairness on the part of the purchaser. This represents a compromise between the policy of strengthening public confidence in the stability of judicial sales and that of strengthening the court's hands in its efforts to secure the best possible result for the benefit of the estate under its protection . . .' "

The case at bar falls within the foregoing rule. There was a substantial disparity between the bid price and the appraised value of the property, ap-

proximately $10,000. And a $5,000 cashier's check was deposited to secure the substantially better price which a resale would offer. Furthermore, there was a difference of approximately $6,500 between Ratett's offer and the additional bid.

Conclusion

Petitioner has failed to show that the decision in this case is in conflict with decisions of any other circuit court or of this court. As a matter of fact, petitioner has proved that all courts agree:

(1) That Section 70(f) involves the exercise of judicial discretion in the approval of a sale.

(2) That in a bankruptcy sale which brings less than 75% of the appraised value, the court can reject an offer and order a resale upon adequate notice to all parties.

(3) Approval of a sale need not be by a formal order but clear convincing unequivocal conduct may constitute such approval.

(4) That disapproval will not be reversed unless a clear abuse of discretion is apparent.

(5) Public confidence in judicial sales is not diminished where the sale is less than 75% of the appraised value and inadequate bids require the resale of trust property.

Not one of petitioner's cases, when analyzed in the light of the particular facts existing in each case, dispute these conclusions.

The harmony existing in all courts is further emphasized by the frequent interchange of citations in all circuits of decisions of other circuits. In fact, the very cases cited by petitioner as being in conflict, have been approved by the courts below.

No reasons for review by this court having been shown, the petition for writ of certiorari should be denied.

Respectfully submitted,

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